interest in land has been created [*Kauri Timber Co.* v. *The Commissioner of Taxes*, (1913) A.C. 771]. In my opinion the substance of the various documents must be ascertained, and I feel no doubt that the intention of the parties was to give the plaintiff some right and interest in Malay Reservation-land contrary to the provisions of the Enactment. Even regarding the effect of the documents as giving the plaintiff merely the right of a lessee and not complete dominion over the property, it is clear that the period of three years, limited by section 8 (i), has been far exceeded.

Although the charges had to be considered in coming to a conclusion as to the meaning and effect of the agreement and power of attorney, there is nothing contrary to the Enactment in the charges themselves, but for the reasons given above I find that the agreement was null and void and that the power of attorney was likewise null and void even if it had not been effectually revoked. I would accordingly allow the appeal with costs here and below.

Appeal allowed.

[APPELLATE CIVIL JURISDICTION]

CUSSEN, J.

April 27, 1935.

HUSSAIN ..... **Defendant-Appellant**

v.

CHANDA SINGH.....**Plaintiff-Respondent**

[SELANGOR MAGISTRATE'S CIVIL APPEAL No. 9 of 1935]

The Bills of Sale Enactment, 1922, section 6 (b)—In the form—The Interpretation and General Clauses Enactment, 1932, section 33.

Section 6 (b) of the Bills of Sale Enactment, 1922, must be read with section 33 of the Interpretation and General Clauses Enactment, 1932.

A bill of sale, given by way of security and containing a clause empowering the grantee to foreclose in the event of the grantor defaulting in payment of the principal or interest, does not conflict with the form prescribed under the Enactment.

S. M. Sharma for the defendant-appellant.

S. M. Yong for the plaintiff-respondent.

Cur. Ad. Vult.

CUSSEN, J.—This is an appeal against the decision of the Magistrate in Kuala Lumpur Magistrate's Civil Suit No. 1832/34.

The plaintiff in that suit asked for an order of seizure and sale of certain cattle in a Bill of Sale of which he was the grantee and of which the defendant in the suit was the grantor. The Magistrate made the order for seizure and sale, and against that order the defendant now appeals.

The appeal proceeds on two main grounds. The first is that the Bill of Sale was void under section 6 (b) of the Bills of Sale Enactment, 1922, on the ground that it is not made in the form A in the second schedule. That section provides that every Bill of Sale made or given by way of security for the payment of money by the grantor thereof shall be void if it is not made in the form A in the second schedule. That is the first main ground of appeal which is argued before me.

The second ground of appeal is that the Bill of Sale is void because the consideration has not been truly set forth in the bill, and consequently under section 4 of the Enactment the failure to truly set forth the consideration in the bill invalidates the bill in respect of the personal chattels comprised therein.

Now I will deal with the first ground of appeal that the bill is void because it is not in the form provided for in the Enactment. Counsel for appellant drew attention to the corresponding section in the 1919 Bills of Sale Enactment which was repealed by the present 1922 Enactment.

Section 7 of that Enactment, No. 26 of 1919, reads as follows:—

> "Every Bill of Sale made after the commencement of this Enactment shall be void unless made substantially in accordance with the form A in the second schedule."

The difference there is of course that in the former Enactment it states "made substantially in accordance with the form A in the second schedule" whereas the present Enactment says "if it is not made in the form A in the second schedule," and it is obvious from that that a literal compliance—exact compliance—with the form of the schedule is required.

In connection with that, however, we must consider section 33 of the Interpretation and General Clauses Enactment, 1932, which reads as follows:—

> "Save as otherwise expressly provided, wherever forms are prescribed slight deviations therefrom, not affecting the substance or calculated to mislead, shall not vitiate them."

So I think in applying section 6 of the Bills of Sale Enactment we must read with it section 33 of the Interpretation and General Clauses Enactment.

Various English decisions have been cited in argument, and, therefore, it may be helpful to consider the words of the English Act. The English Act corresponding to the section, uses the words "accordance with the form."

In *Thomas* v. *Kelly*, 13 A.C. 520 it is ruled that a divergence is substantial when it departs from the statutory form in anything which is characteristic of that form; so any substantial

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(Note.—An application was made to the Court of Appeal for leave to appeal against the decision of Cussen, J. The application was heard on the 16th May, 1935, before Burton, J., Whitley, J., and Howes, J., and was dismissed. —Editor).

divergence from the form makes the Bill of Sale void between the grantor and the grantee, and that is held to be so even though that does not alter the legal effect (*Parsons* v. *Brand*, 25 Q.B.D. 110); or if it gives the Bill of Sale a different legal effect or consequence than that which would attach to it if drawn in the proper form (*Thomas* v. *Kelly*, *supra*).

The section must be construed as prescribing not what a Bill of Sale must contain but what it must not contain.

Now this particular Bill of Sale is attacked on that ground by the appellant in the following part of the Bill. The second clause in the Bill reads as follows:—

> "And the said Hussain son of Zaidullah Khan doth also agree with the said Chanda Singh son of Roor Singh that (1) He will keep the chattels in perfect good and sound condition and will not take them away from the jurisdiction of this Court nor he will sell or transfer to any one until this sum is paid in full. (2) He will pay the principal sum on or before 15.3.1934, and interest due thereon on its due date. (3) In default of any conditions herein mentioned the said Chanda Singh is empowered to foreclose this Bill of Sale."

Counsel for appellant argues that this cannot properly be inserted in the bill in compliance with the form. His argument is that condition 2 to which I have referred in the bill is not in any case a condition for the maintenance or defeasance of the security. I am afraid the argument of learned counsel for the appellant is one with which I cannot agree.

I find in *Stroud's* Judicial Dictionary, page 491, the meaning of "defeasance" which reads as follows:—

> "Defeasance in the prescribed form of a Bill of Sale means the putting an end to the security by realising the goods for the benefit of the mortgagee, e.g. powers of lawful seizure and sale and reasonable appropriation of the proceeds."

This particular condition provides that the principal obligation shall be met as provided; that in default of its not being met the security shall be liable to sale.

I compare our Enactment with the English Act. There is nothing in our Enactment corresponding to section 7 of the English Act. It sets forth the statutory causes of seizure. The first is if the grantor shall make a default in payment of the sum or sums of money thereby secured at the time therein provided for payment, or in the performance of any covenant or agreement contained in the Bill of Sale and necessary for maintaining the security.

There are several other causes specifically enumerated which I think I need not read, but our Enactment does not set forth any cause of seizure, although it is clear that our Enactment is framed generally on the English Act.

Reading from *Halsbury*, Vol. 3, page 79, para. 139, statutory causes of seizure are as follows:—

> "(1) If the grantor makes default in the payment of the sum or sums secured by the bill of sale at the time therein provided for payment. But a grantee is entitled to seize the goods on default in payment of any instalment due under a bill of sale, although the bill of sale does not provide that the whole debt shall become due on non-payment of one instalment....."

Now since those causes of seizure are not statutory in this country they are normally inserted in bills of sale in the part provided for the terms as to the maintenance and defeasance of the security. I do not think that condition 2 of clause 2 is a departure or variation from the form such as will render it void under section 6 of the Enactment; but a more difficult question is the insertion following on term 2 of the following words:—

> "In default of any conditions herein mentioned the said Chanda Singh is empowered to foreclose this Bill of Sale,"

and as I follow it the argument of counsel for the appellant is mainly directed upon the inclusion of those words in the Bill of Sale.

Before proceeding to consider the effect of those words in the Bill of Sale it might be relevant in argument to point out the difference between the English Act and our Enactment in respect of the proviso in the form. The proviso in the English Act reads as follows:—

> "Provided always that the chattels hereby assigned shall not be liable to seizure or to be taken possession of by the said C.D. for any cause other than those specified in section seven of the Bills of Sale Act (1878) Amendment Act 1882."

You will see that the causes in the proviso are enumerated in section 7 of the English Act; the proviso says that you cannot seize except for those causes.

The proviso in the form in our Enactment does not deal with the causes of seizure which I have pointed out. There is nothing corresponding to section 7 of the English Act in our Enactment; but it deals with the methods by which seizure of chattels may be carried out and that is: whatever cause may be the ground of seizure or possession it must be done by an order of Court. In other words we have not the right

which the grantee of an English Bill of Sale has to take possession of the goods. This is not given to the grantee under our law; and if one of the clauses gives the right of seizure he must come to the Court and get an order. Whereas the English proviso deals with the cause, our proviso deals with the remedy or method of enforcement.

Now the argument of learned counsel for the appellant is based upon the use of the expression "foreclosure" which appears in the second clause of the Bill of Sale—"The said Chanda Singh is empowered to foreclose this Bill of Sale"—and the submission is that in English law the word "foreclosure" is used in Bills of Sale to mean the power to seize in certain circumstances laid down by Statute; but there is no power to seize in our Enactment, which is given only by an order of Court; and he proceeds to argue that the word "foreclosure" in this Bill of Sale is a substantial divergence from the form and as such the bill is void under section 6.

Now what is the meaning of the word "foreclosure"? It would appear that the word "foreclosure" is used in relation to the application to the Court for an order to seize and take possession and sell the chattels.

The word "foreclosure" does not appear in our Enactment, but it is certainly in common use, not only, as appears here, in bills of sale, but also in relation to the procedure for obtaining an order of sale of charged lands under the Land Code; the word has been used loosely. You have to obtain an order of sale of charged lands; and in this case it would appear also that you have to obtain an order of seizure and sale of chattels.

The word "foreclosure" is defined as follows:

> "A proceeding which bars or extinguishes a mortgagor's right of redeeming a mortgaged estate. The term is specifically applied to the proceeding instituted in a court of chancery or equity by a bill of foreclosure, and called a strict foreclosure, resulting in the forfeiture of the right to redeem and the vesting of the estate in the mortgagee in perpetuity. This is distinct from the statutory foreclosure, also made by a suit of equity, which involves the satisfaction of the debt to the extent made possible by a sale of the mortgaged property. Under the strict foreclosure the proceeding is completed by the judgment of the Court; in the statutory proceedings, by the sale under foreclosure" (*Webster's* New International Dictionary page 849),

so that there an order of sale of land at the instance of the mortgagee in a suit in chancery is termed a foreclosure. In the law of real property foreclosure can only be obtained by going to Court and getting an order; it is not a remedy exercised by the mortgagee without an order of Court; so that the word "foreclosure" here appears then to be equivalent to proceeding under the Enactment, to obtain from the Court an order for seizure and sale.

In the English Act the right is one which is exercised when causes arise without the intervention of the Court; in our law the right is exercised by means of an order of Court.

The word "foreclosure" appears to me simply to mean the exercise of the right whatever form it takes the right to seizure and possession It appears to me, therefore, that the words "is empowered to foreclose this Bill of sale" in this particular Bill mean nothing more than to empower under certain conditions to go to the Court and apply for an order to seize and take possession of the chattels and possibly an order for sale under section 11 of our Enactment.

If that is so there is no contradiction or conflict between those words and the proviso because the proviso simply says that you must not seize and take possession except by means of an order of Court. The causes are not statutory, but are made by contract between the parties, and inserted in the Bill of Sale. You can only seize and take possession by obtaining an order from the Court to do so, and it appears to me, on the consideration of the use and meaning of the word "foreclosure," that I have given, that that is a proper interpretation to be used.

The English cases that were cited to me are *Davis* v. *Burdon*, 11 Q.B.D. 537 and *Furber* v. *Codd*, 18 Q.B.D. 494. These were cases in which, without any question, there was inserted in the bill of sale something which was in direct conflict with the statutory causes of seizure in section 7 of the Bills of Sale Act, and as such in those cases the particular Bills of Sale were held void.

I see nothing in this Bill of Sale in either condition 2 or in the provision for power to foreclose and obtain an order for seizure which is in any way in conflict with the provision of the form in our Enactment. That disposes of the first ground of appeal: in my opinion it is not a good ground of appeal.

Now turning to the second ground upon which this appeal has been argued. That depends upon the question of fact.

At the hearing before the Magistrate the present appellant alleged that the consideration stated in the Bill of Sale was not the true consideration, and in consequence if that was so under section 4 of our Enactment the Bill of Sale was void in respect of the chattels. That is an allegation the burden of proof of which rested on the defendant.

First of all this Bill of Sale was a security bill as is provided for in our Enactment and was read and explained fully to the defendant who signed and executed this Bill of Sale.

Section 9 (ii) of the Enactment says—

"The execution by the grantor of every bill of sale shall be attested—

(*a*) by an advocate and solicitor of the Supreme Court not being the advocate and solicitor of the grantee; or

(*b*) by a Magistrate or by a Registrar or Assistant Registrar of the Supreme Court;

who shall personally explain to the grantor the effect thereof, and the attestation shall state that before the execution of the bill of sale the effect thereof was so explained as aforesaid."

I have no doubt that the Bill of Sale was personally explained to the grantor, and the learned Magistrate before whom the Bill of Sale was executed happens to be the Magistrate who heard this suit also, and he is perfectly certain that this was done. But the grantor comes along and he alleges that that is entirely wrong, and that the consideration was not truly set forth. Of course it is open to him to prove that it is so in such a case as this; but first of all I think the Magistrate would have been very careful before accepting a mere allegation of this kind in a matter like this.

The evidence produced before the Magistrate supporting that allegation of the defendant's consists of the evidence of the defendant-appellant himself and of two witnesses who say they were present when this Bill of Sale was executed and the transaction carried out, not before the Magistrate, but by a petition writer. That is the evidence in support of his contention.

I will not spend more time in going through that. The Magistrate says that he does not believe the witnesses, and I see nothing there which would justify me in reversing the decision of the learned Magistrate on this issue before him. Consequently, in my opinion, the appeal also fails on that ground, and I dismiss the appeal with costs.

Appeal dismissed.

[APPELLATE CIVIL JURISDICTION]

THOMAS, C. J., WHITLEY, J. & HOWES, J.

June 15, 1935.

G. L. O'HARA HICKSON...Petitioner-Appellant

v.

I. O'HARA HICKSON.....Respondent

L. LEVINSONAS.....Co-respondent

[SELANGOR CIVIL APPEAL No. 14 of 1934]

The Divorce Enactment, 1928—Domicile—Intention to acquire domicile of choice—Evidence—Declaration of intention.

The petitioner-appellant, a rubber planter in Selangor, was born in Ireland in 1887 and his domicile of origin was the Irish Free State. He went abroad in 1906, returned to Ireland for four months in 1913, again for five weeks in 1919 and since then had never been back to Ireland.

He gave evidence that his intentions were to spend the rest of his life as a planter in Selangor and on retirement, although he had made no plans as to that, to settle in this country. This evidence was not controverted by the respondent or co-respondent, neither of whom appeared at the hearing of the petition.

In the Court below the Judge accepted the evidence of the petitioner-appellant but did not consider that such evidence established the acquisition of a domicile of choice in Selangor.

Held, that cases of domicile must be decided with regard to their own special facts.

Held further, that since there was no act done or other evidence given by the petitioner-appellant which conflicted with his evidence of intention, and such evidence, which was believed by the trial Judge, not having been controverted by the respondent or co-respondent, it was sufficient to establish a domicile of choice in Selangor.

Decision of Burton J. in *Hickson* v. *Hickson*, (1933-1934) F.M.S.L.R. 318; 4 Mal.L.J. 13. reversed

The Hon. Mr. E. D. Shearn for the petitioner-appellant: It was clear that the appellant had abandoned all thought of returning to his domicile of origin. The judgment of Lord Lindley in *Winans* v. *Attorney-General*, (1904) A.C. 287 was therefore in point. It was possible for appellant to acquire a domicile of choice during his residence in the State of Selangor—See *Haldane* v. *Eckford*, L.R. 8 Eq. 631. The real point is what is appellant's present intention. See *Bell* v. *Kennedy*, L.R. 1 Sc. & Div. 307. The Judge in the Court below accepted the appellant's evidence. He should have found that it was immaterial to consider that the appellant might subsequently change his present intention. See *Boldrini* v. *Boldrini*, (1932) P. 9 and *Udny* v. *Udny*, L.R. 1 Sc. & Div. 441. *Attorney-General* v. *Yule*, 145 L.T. 9 was distinguishable on the facts. *Waddington* v. *Waddington*, 36 T.L.R. 359 showed the type of proof of change of domicile. *Bryce* v. *Bryce*, (1933) P. 83 and *Hodgson* v. *De Beauchesne*, 12 Moo. P.C.C. 285 which were referred to in the judgment in the Court below related to declarations of persons not before the Court and had no relevance to statements on oath in the face of the Court.

Respondent absent.

Co-respondent absent.

Cur. Ad. Vult.

THOMAS, C.J.—This is an appeal by George Lionel O'Hara Hickson the petitioner in a divorce petition which was dismissed on the ground that the petitioner had not established a domicile choice.

In the evidence the petitioner stated that he had left Ireland, where he had been born in 1887, and where his father was domiciled, in 1906 when he went to take up tea planting in Assam.